In Missouri, where U.S. Cellular was recently designated as an ETC, it has promised to deliver 39 cell sites with high-cost support within the first two years after it is designated, over and above investments it will make with internally generated capital.[45]

In Maine, U.S. Cellular reports use of high-cost support in its first several months as an ETC to construct 6 cell sites in very small towns such as Bingham, Fort Fairfield, and Jonesport, and has 21 more sites planned for construction in 2007. RCC, another ETC in the state, detailed in its most recent annual report to the Maine Public Utilities Commission how it used high-cost support to construct 19 cell sites from July 2005 to June 2006 in rural areas including Fort Kent, Leeds, and Edgecomb.

Similar stories could be cited in virtually every state where CETCs have been designated. It is beyond dispute at this point that wireless carriers are using support to construct high-quality competitive wireless networks in areas that would not otherwise support new towers. While carrier plans for the immediate future are often subject to protective orders, the Commission can easily learn from state regulatory commissions of the substantial new infrastructure investments being made by wireless companies and we would be pleased to provide this information.[46]

Far from being broken, it is apparent that the current high-cost support mechanism, which is requiring accountability by CETCs, is delivering critical health and public safety benefits to rural consumers in every area where CETCs have been designated. It is thus impossible to view a proposal to cap support to the very carriers who are delivering these benefits as anything other than an assault on public safety which must be rejected.

[45] *See* Application of U.S. Cellular's subsidiary companies before the Missouri Public Service Commission to be an eligible telecommunications carrier in Case No. TO-2005-0384.

[46] Upon request, we would be pleased to provide the Commission with maps showing construction plans in many states that have been submitted under seal to protect the new CETCs from revealing proprietary information to competitors.

B. The Benefits of Competition Cannot Come to Rural America Without Universal Service Support.

The Commission has already ruled repeatedly that meaningful competition—wherein wireless can become a substitute for wireline service—cannot occur in areas where there are insufficient wireless cell sites to deliver a high-quality service.[47] There is substantial evidence that rural consumers in many areas of America are frustrated with their inability to receive high-quality wireless services, and that the introduction of high-quality wireless service has driven significant consumer benefit. For example, at a public hearing in McCook, Nebraska, consumers, ranchers, emergency medical technicians, and economic development directors all described how important wireless services are.[48] One woman remarked that she pays nearly $100 per month in long distance charges from her wireline telephone and cannot cut the cord because her wireless phone does not work where she lives.[49] Without any CETC having an ability to construct new facilities, she cannot switch to a service that offers state-wide (or greater) local calling area.

The same kind of evidence is readily available on a macro level as well. A recent study by the Centers for Disease Control and Prevention ("CDC") revealed that at least 12.8% of consumers are cutting the cord, an accelerating trend across the country.[50] The CDC study also noted that cord cutting is much higher, 22.4%, **among low-income consumers**.[51] This is a

[47] *See Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission, Declaratory Ruling*, 15 FCC Rcd 15168 (2000) ("*South Dakota Preemption Order*").

[48] *See* McCook Hearing Transcript.

[49] *See id.* at p. 272.

[50] *CDC Report* at 2 ("Among the findings from the last 6 months of 2006, at least 12.8% of households did not have a traditional landline telephone, but did have at least one wireless telephone.").

[51] *Id.*

critical finding in that many, if not most, low-income consumers in rural areas cannot afford to subscribe to both wireline and wireless service.

If wireless does not form a substitutable service for wireline service, then low-income consumers are disproportionately harmed by the inability to choose lower-priced alternatives.[52] Most egregious, without the designation of a CETC, Lifeline-eligible consumers cannot lower their cost of voice service by switching to wireless and CETCs cannot access support to make new investments needed to provide high-quality service.

The CDC study also indicated (based on telephone status information obtained from July through December 2006) that 12.7% of adults in metropolitan areas use only wireless phones, while 8.0% of adults in non-metropolitan areas have cut the cord.[53] This statistic suggests that parity does not exist between urban and rural areas regarding the availability of competitive choices for telephone service. The cap proposed by the Joint Board would magnify this disparity, making it more difficult for consumers in rural areas to take advantage of the benefits of wireless service. In addition, the CDC study shows that the number of employed adults with only wireless phones is more than double the number of adults who have cut the cord but who are not working at a job or business.[54] This statistic suggests that wireless phones are playing an increasingly widespread role in the business sector (based on the reasonable assumption that employed adults with only wireless phones use those phones in part for business-related activities). The deployment of wireless technology in rural areas is thus an important component of economic development in those areas, as wireless phones continue to assume a more central

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[52] If support is properly targeted to high-cost areas, and the benefits properly measured in this way, this forms a sound policy answer to the question why urban residents should pay into the fund.

[53] *CDC Report* at 7 (Table 2).

[54] *Id.* at 6 (Table 2) (13.9% of adults working at a job or business have cut the cord, while 6.2% of adults who are not in the workforce (and who also are not students or homemakers) have cut the cord).

role in business communications. The proposed cap will have the effect of slowing this deployment, with adverse economic effects in rural areas.

V. IMPOSING A CAP ONLY ON ONE CLASS OF CARRIER WOULD VIOLATE THE COMMISSION'S CORE PRINCIPLE OF COMPETITIVE NEUTRALITY, CONFLICT WITH STATUTORY REQUIREMENTS AND COMMISSION PRECEDENT

The core principle of competitive neutrality, adopted by the Commission ten years ago[55] pursuant to Section 254(b)(7) of the Communications Act of 1934 ("Act"),[56] requires that universal service support mechanisms must be competitively neutral. The Commission intends the principle to mean that "universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another."[57]

A central goal behind the principle is to "enable the emergence of competition in high-cost areas served by Rural Carriers . . . ."[58] The Commission, in adopting the principle, concluded that competitively neutral rules would guard against unfair competitive advantages that could suppress market entry and deprive consumers of service choices.[59] The competitive neutrality principle is consistent with the judicial determination that the universal service program "must treat all market participants equally . . . so that the market, and not local or

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[55] *Federal-State Joint Board on Universal Service, Report and Order,* 12 FCC Rcd 8776, 8800-06, paras. 46-55 (1997) ("*First Report and Order*") (subsequent history omitted).

[56] 47 U.S.C. § 254(b)(7).

[57] *First Report and Order*, 12 FCC Rcd at 8801, para. 47.

[58] Rural Task Force, White Paper 5, *Competition and Rural Service* (Sept. 2000), at 11, http://www.wutc.wa.gov/rtf/old/RTFPub_Backup20051020.nsf/?OpenDatabase (accessed May 31, 2007).

[59] *First Report and Order*, 12 FCC Rcd at 8802, para. 48.

federal government regulators, determines who shall compete and deliver services to customers."[60]

The Joint Board expresses its belief in the *Recommended Decision* that its proposed cap does not violate the Commission's principle of competitive neutrality, and pins this belief on its claim that there are disparities in regulatory treatment between ILECs and CETCs and perceived deficiencies in the identical support rule.[61] Even assuming *arguendo* that there could be some basis for the Joint Board's assertions about regulatory parity and the identical support rule, these views do not give license to impose a cap that violates competitive neutrality and is, on its face, fundamentally and fatally flawed.

In addition to violating the competitive neutrality principle, the Joint Board's proposal ignores *Alenco*, which provides an avenue for imposing a cap that RCA and ARC support: making high-cost support fully portable. Finally, the proposed cap conflicts with statutory requirements that local markets must be opened to competition, and with Commission precedent governing the balancing of universal service with policies promoting competition. These deficiencies in the proposed cap are evident throughout the country, but would be most egregious in a number of states where high-cost support disbursements to CETCs would be severely restricted or entirely blocked.

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[60] *Alenco*, 201 F.3d at 616. The court concluded that this principle of equal treatment is dictated not only by the economic realities of competitive markets but also by Section 214(e)(1) of the Act, 47 U.S.C. § 214(e)(1). *Id.*

[61] *Recommended Decision* at para. 6.

A. The Proposed Cap Directly Conflicts with Competitive Neutrality and with Prior Commission Precedent.

The proposed cap on support to CETCs is not competitively neutral, nor is it grounded in any sensible interpretation of the Act.[62]

The Joint Board justifies a cap on CETCs because:

> Fundamental differences exist between the regulatory treatment of competitive ETCs and incumbent LECs. For example, competitive ETCs, unlike incumbent LECs, have no equal access obligations. Competitive ETCs also are not subject to rate regulation. In addition, competitive ETCs may not have the same carrier of last resort obligations that incumbent LECs have.[63]

The Joint Board's conclusion ignores the Commission's own rulings on this very matter:

> Several ILECs assert that the Joint Board's recommendation not to impose additional criteria is in conflict with its recommended principle of competitive neutrality because some carriers, such as those subject to COLR [carrier of last resort] obligations or service quality regulation, perform more burdensome and costly functions than other carriers that are eligible for the same amount of compensation. ***The statute itself, however, imposes obligations on ILECs that are greater than those imposed on other carriers, yet section 254 does not limit eligible telecommunications carrier designation only to those carriers that assume the responsibilities of ILECs.***[64]

[62] *See South Dakota Preemption Order*, 15 FCC Rcd at 15177, para. 22 ("[T]he proper inquiry is whether the *effect* of the legal requirement, rather than the method imposed, is competitively neutral.") (emphasis in original) (footnote omitted).

[63] *Recommended Decision* at para. 6.

[64] *First Report and Order*, 12 FCC Rcd at 8857-58, para. 144 (emphasis added) (footnotes omitted). Moreover, the Joint Board itself has recognized that regulatory parity should not be blindly pursued. In addressing ETC designation requirements, the Joint Board has indicated that it would not recommend that CETCs must be required to comply with all the consumer protection standards imposed on wireline incumbent LECs, because regulators "should not require regulatory parity for parity's sake." *Federal-State Joint Board on Universal Service, Recommended Decision*, 19 FCC Rcd 4257, 4271, para. 34 (2004). Thus, the Joint Board has recognized the fact that it would be bad public policy to design universal service mechanisms or rules that enforce regulatory parity between different classes of providers. It therefore follows that it would be bad public policy to design a cap that inherently violates the competitive neutrality principle and then seek to justify the mechanism on the ground that there is no regulatory parity between the provider who is disadvantaged by the cap and the provider who benefits from the cap. If there is no basis for requiring regulatory parity, then how can the absence of regulatory parity be a justification for an anti-competitive cap?

That is, the very factors cited by the Joint Board for discriminating between ILECs and CETCs were specifically rejected by the Commission.[65] Adopting the Joint Board's rationale for finding that a cap on CETCs would be competitively neutral would represent the very essence of arbitrary and capricious rulemaking.

Capping CETCs unfairly and disproportionately disadvantages wireless carriers, who form the overwhelming majority of CETCs. As proposed by the Joint Board, the cap also draws a completely arbitrary line that unfairly disadvantages those CETCs who are operating in states which currently receive little or no support.[66] That is, a CETC designated in Missouri during 2007 will be required to participate in a pool of $123,000 in annual support available to that state for CETCs as long as the cap is in effect.[67] CETCs designated in Connecticut, Delaware, Idaho, Illinois, Maryland, Massachusetts, Missouri, New Hampshire, New Jersey, Ohio, Rhode Island, South Carolina, and Utah will receive nothing, or virtually nothing.[68] In other states, the pool of support is tens, or even hundreds, of millions of dollars.[69]

The Joint Board's proposed cap would skew the marketplace, inhibit competition, limit the available quantity of services, and restrict the entry of potential service providers. The proposal therefore represents a significant departure from the competitive neutrality principle articulated in the *First Report and Order*:

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[65] *See, e.g., First Report and Order*, 12 FCC Rcd at 8820, para. 79 ("[W]e find that supporting equal access would undercut local competition and reduce consumer choice and, thus, would undermine one of Congress's overriding goals in adopting the 1996 Act. Accordingly, we do not include equal access to interexchange carriers in the definition of universal service at this time.").

[66] This issue is discussed further in Section V.E., *infra*.

[67] *See* Universal Service Administrative Company, *2006 Annual Report* ("*USAC 2006 Annual Report*") at 41, available at http://www.universalservice.org/_res/documents/about/pdf/usac-annual-report-2006.pdf (accessed June 4, 2007).

[68] According to the Universal Service Administrative Company, Illinois received approximately $1,000 in CETC support in 2006, not enough to cut the grass around a cell site. *See id.*

[69] *See Recommended Decision* at Appendix B.

> Our decisions here are intended to minimize departures from competitive neutrality, so as to facilitate a market-based process whereby each user comes to be served by the most efficient technology and carrier. We conclude that competitively neutral rules will ensure that such disparities are minimized so that no entity receives an unfair competitive advantage that may skew the marketplace or inhibit competition by limiting the available quantity of services or restricting the entry of potential service providers. [70]

In states with little or no support available to CETCs, the effect of the proposed cap would be extreme. Competition would be inhibited because support enables (and indeed eligibility for support requires) a carrier to offer and advertise its service throughout a service area. Support is used to construct new cell sites that provide high-quality service everywhere that consumers live, work, and play, upgrading underserved areas so that wireless can become a substitute service, as it is in urban areas. In many, if not most, rural areas, constructing and operating a high-quality wireless network without support is not feasible.[71] Thus, a cap imposed on carriers who are still in the process of building out their networks in many rural areas would limit the available quantity of services to consumers and restrict potential service providers from entering as viable substitute service providers. This contradicts the very principles the Commission articulated in the *First Report and Order.*

Finally, by citing "differences" in the "regulatory treatment" accorded to ILECs and ETCs, the Joint Board ignores the fact that Section 254(e) of the Act requires all ETCs to use support not for compliance with wireline regulatory mandates, but "only for the provision, maintenance, and upgrading of facilities and services for which the support is intended."[72] ILECs have been in their respective markets for several decades and achieved near complete

[70] *First Report and Order*, 12 FCC Rcd at 8802, para. 48.

[71] Indeed, with at least eight commercial wireless licensees having been authorized throughout the country, if there were a business plan for providing high-quality service throughout rural America, surely it would have happened by 2007.

[72] 47 U.S.C. § 254(e).

build-out years ago, while CETCs tend to have much younger networks that are in need of significant capital investment to reach unserved and underserved areas. It would not be competitively neutral to deprive CETC of the means to build out their networks so that they can compete with ILECs that have already built out their networks with the benefit of implicit and explicit subsidies heretofore unavailable to competitors.

B. The Joint Board's Reliance on the Identical Support Requirement as a Justification for the Proposed Cap Is Misplaced.

In further attempting to support its claim that its proposed cap does not violate the Commission's competitive neutrality principle, the Joint Board observes that "under the identical support rule, both incumbent rural LECs and competitive ETCs receive support based on the incumbent LECs' costs. Therefore, incumbent rural LECs' support is cost-based, while competitive ETCs' support is not."[73] The Joint Board seems to imply, without any explanation, that the identical support rule is another "regulatory difference" that can serve as a basis for its claim that the cap does not violate the competitive neutrality principle.

The Joint Board provides no analysis to support its assertion that the identical support rule may be outdated, may no longer be appropriate,[74] and may not reflect "the economic realities of different technologies."[75] Instead, the Joint Board recommends that the Commission should consider whether to repeal or modify the rule. Thus, the Joint Board's claim that the cap would not violate the competitive neutrality principle seems to be based on its suppositions about the alleged inadequacies of the identical support rule.

The Joint Board's unsubstantiated and unexplained concerns about the identical support rule completely ignore that the Commission has failed to implement portability. When combined

[73] *Recommended Decision* at para. 6.

[74] *Id.* at para. 7.

[75] *Id.* at para. 12 (footnote omitted).

with portability, the identical support rule serves as a well-crafted means of advancing the statutory policy of promoting a competitively neutral means of fostering competitive entry in rural and high-cost areas. The rule provides an incentive to competitive carriers to enter rural and high-cost markets if their costs are likely to be lower than, or equal to, the costs of the incumbent. Without the receipt of per-line support pegged to the incumbent's costs, it would be difficult for CETCs to compete against entrenched monopoly carriers operating in rural areas with a completely built-out, and heavily subsidized, network. Moreover, the high-cost support received by CETCs is used (as directed by Section 254(e) of the Act[76]) to invest in the build-out of facilities to deliver services to consumers in the rural and high-cost areas served by the CETCs.

The Commission has concluded that basing CETC support on ILECs' embedded costs does not amount to preferential treatment of competitors and therefore does not violate the Act or the principle of competitive neutrality:

> We are not persuaded by commenters that assert that providing support to CLECs based on the incumbents' embedded costs gives preferential treatment to competitors and is thus contrary to the Act and the principle of competitive neutrality. **While the CLEC may have costs different from the ILEC, the CLEC must also comply with Section 254(e), which provides that "[a] carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended." Furthermore, because a competing eligible telecommunications carrier must provide service and advertise its service throughout the entire service area, consistent with section 254(e), the CLEC cannot profit by limiting service to low cost areas. If the CLEC can serve the customer's line at a much lower cost than the incumbent, this may indicate a less than efficient ILEC.** The presence of a more efficient competitor will require that ILEC to increase its efficiency or lose customers. State members of the Joint Board concur with our determinations regarding the portability of support.[77]
>
> **To ensure competitive neutrality, we believe that a competitor that wins a high-cost customer from an incumbent LEC should be entitled to the same amount of support**

[76] 47 U.S.C. § 254(e).

[77] *First Report and Order*, 12 FCC Rcd. at 8933.

> **that the incumbent would have received for the line, including any interim hold-harmless amount.** While hold-harmless amounts do not necessarily reflect the forward-looking cost of serving customers in a particular area, we believe this concern is outweighed by the competitive harm that could be caused by providing unequal support amounts to incumbents and competitors. **Unequal federal funding could discourage competitive entry in high-cost areas and stifle a competitor's ability to provide service at rates competitive to those of the incumbent.**[78]

The Commission's finding is sound today, just as it was ten years ago, because the utility of the identical support rule as a driver for competitive entry will continue to have force until competition in rural and high-cost markets is more widespread, as measured by indicators such as the degree of build-out of competitive networks and the degree of shift in lines from ILECs to CETCs.

Shifting away from the ILECs' embedded costs will be necessary as wireless becomes a prominent or dominant provider of the supported services. Wireless carriers are not wedded to ILEC costs as a basis for support—what is critical is that all marketplace competitors receive the same level of support so that the marketplace is not distorted.[79]

The identical support rule, far from conflicting with the Commission's competitive neutrality principle, continues (as the Commission intended) to serve as a powerful vehicle promoting competitive entry and greater efficiency by incumbents, allowing consumers in rural and high-cost areas to choose the services and service provider that best suit their needs and providing an effective means of introducing efficient competition in rural and high-cost areas where ILEC costs are inflated by operational inefficiencies.[80]

[78] *Federal-State Joint Board on Universal Service, Ninth Report and Order and Eighteenth Order on Reconsideration,* 14 FCC Rcd at 20432, 20480 (1999) (emphasis added).

[79] In urban areas, the absence of support means that all competitors operate on a level playing field without distortion. In rural areas, identical support replicates that level field, eliminating market distortions.

[80] For a discussion of the advantages of the identical support requirement, see *Wood Paper* at 12-15. *See also* Joint Comments at 12-21 (explaining that the identical support rule is the only way to distribute high-cost support on a competitively neutral basis).

C. Even If a Cap Were Needed, It Could Be Made Legally Sustainable by Making High-Cost Support Fully Portable.

In proposing the CETC cap, the Joint Board ignores *Alenco*, which affirmed competitive neutrality, the identical support rule, and properly focused universal service mechanisms on the consumer:

> *Finally,* the program must treat all market participants equally—for example, subsidies must be portable—so that the market, and not local or federal government regulators, determines who shall compete for and deliver services to customers. Again, this principle is made necessary not only by the economic realities of competitive markets but also by statute. *See* 47 U.S.C. § 214(e)(1) (requiring that all "eligible telecommunications carrier[s] . . . shall be eligible to receive universal service support").[81]

> The Act only promises universal service, and that is a goal that requires sufficient funding of *customers,* not *providers.* So long as there is sufficient and competitively-neutral funding to enable all customers to receive basic telecommunications services, the FCC has satisfied the Act and is not further required to ensure sufficient funding of every local telephone provider as well.[82]

Even assuming a cap is needed (and, as shown above, it is not), under *Alenco* it could be legally sustained if support were made fully portable.[83] That is, if ILECs lose support when they lose a customer, as do CETCs, then the fund would be capped in a competitively neutral fashion. The Commission has persuasively argued for full portability, stating that "if the incumbent retained the subsidy even though it no longer was providing high-cost service to a customer lost to competition, it necessarily would be using the subsidy for a purpose other than that intended by the statute."[84]

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[81] *Alenco*, 201 F.3d at 616 (emphasis in original); *see also* FCC Brief in *Alenco* at 48. (The court accepted the Commission's argument that portability is required by statute.)

[82] *Alenco*, 201 F.3d at 620 (emphasis in original).

[83] As demonstrated in *Alenco*, a cap on ILEC support similarly caps support available to CETCs, who only receive "per-line" support that is equal to ILECs, not more.

[84] FCC Brief in *Alenco* at 47-48.

That portability is needed is further demonstrated by substantial evidence that wireline carriers are "over-earning." That is, their rates of return sometimes greatly exceed the rate prescribed for monopoly wireline carriers. For example, the 2005 Annual Statistics for ILECs issued by the Oregon Public Utilities Commission contains an analysis of the rates of return for rural wireline carriers in the state. A number of carriers are significantly over-earning—some with rates of return approaching 30%.[85] Without an investigation of how much over-earning is going on across the country in the wireline industry, it is simply wrong to conclude that mandating portability, a short-term reform which is transparent and simple to implement, is not in *consumers*' best interest.

D. Even If the Joint Board's Concerns About Regulatory Parity and the Identical Support Rule Were Credible, These Concerns Cannot Justify Imposition of a Cap That Violates the Competitive Neutrality Principle.

We have shown in the previous sections that the Joint Board's apparent concerns about differences in regulatory treatment between ILECs and CETCs, and about the continuing appropriateness of the identical support rule, have no basis. The disparities in regulatory treatment reflect the fact that ILECs, unlike CETCs, have long had monopoly control of local exchange markets and have been the long-time beneficiaries of direct and indirect government subsidies to support their provision of service. Similarly, a central purpose of the identical support requirement is to induce and sustain competitive entry into these monopoly local exchange markets so that consumers may receive the benefits flowing from the availability of competitive service alternatives.

If we were to assume, however, that, contrary to all the evidence, the Joint Board has raised credible concerns about the advisability of continuing to maintain the identical support

[85] Oregon Public Utilities Commission, *Small Telecommunications Utilities, Oregon and System Operations, Year Ending Dec. 31, 2005*, http://www.puc.state.or.us/PUC/telecom/stats05.pdf (accessed May 31, 2007).

requirement and about the regulatory disparities between ILECs and CETCs, these concerns still cannot be enlisted by the Joint Board in its effort to demonstrate that its proposed cap passes the competitive neutrality test.

In claiming that the proposed cap does not violate the competitive neutrality principle, the Joint Board implicitly acknowledges the importance of the principle and the fact that compliance with the principle is a *sine qua non* for establishing the lawfulness of the cap. But the Joint Board does not attempt to show that the cap itself is competitively neutral, for the simple reason that such a showing is impossible. As we have demonstrated, the *raison d'être* of the proposed cap is to stem the "explosive" growth of the fund by disbursing less support to CETCs, thus inexorably imposing a competitive disadvantage on CETCs.

This quandary faced by the Joint Board led to the attempted sleight of hand that plays out in the *Recommended Decision*. Instead of having us look at the terms of the proposed cap, and the obvious ways in which these terms violate competitive neutrality, the Joint Board tries to induce us to look at other issues, which are completely extraneous to the operation of the cap, and then states its belief that these other issues are the "reasons" why the proposed cap does not violate the competitive neutrality principle.

The problem with the Joint Board's logic is that it is completely at odds with the purpose and application of the competitive neutrality principle. The application of the principle is straightforward: Once it is established that a proposed mechanism or rule is *not* competitively neutral, then the mechanism or rule must be rejected. That is the end of the inquiry. The Commission did not establish or envision a second step to the analysis, in which, even though it has been determined that the proposed mechanism or rule is not competitively neutral, the mechanism or rule still may be permitted to take effect because of other considerations that have nothing to do with the terms or effect of the proposed mechanism or rule.

The Joint Board attempts to manufacture this second step, ignoring the fact that such an analysis has no basis in the Commission's formulation of the principle and in fact would eviscerate the principle. This is so because, under the Joint Board's approach, so long as the identical support rule or the regulatory disparities cited by the Joint Board continued to be in effect, the sky would be the limit on the types of anti-competitive universal service mechanisms and rules that could be devised and then "justified" by making reference to the identical support rule or the disparate regulatory treatment (or some other "[f]undamental differences"[86] conjured up by the Joint Board).

Nor can it be argued that a demonstrably unfair advantage imparted by a universal service mechanism or rule, such as the proposed cap, can be transformed into a "fair" advantage—and thus be made permissible under the principle[87]—because the advantage can be balanced against perceived disadvantages that are extraneous to the proposed mechanism or rule. The Commission's test is limited to and directly focused on whether the mechanism or rule—and only the mechanism or rule—treats providers differently in a way that is unfair. There is no escaping the conclusion that this proposed mechanism is inherently unfair because it would cap disbursements to only one class of carrier.

In sum, the Joint Board completely missed the mark in failing to propose portability as the solution to fund growth. A CETC-only cap fails the Commission's own core principle of competitive neutrality and, as such, must be rejected.

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[86] *Recommended Decision* at para. 6.

[87] The Commission held that "competitive neutrality means that universal service support mechanisms and rules neither *unfairly* advantage nor disadvantage one provider over another . . . ." *First Report and Order,* 12 FCC Rcd at 8801, para. 47 (emphasis added).

E. The Proposed Cap, By Shutting Off or Severely Restricting Fund Disbursements in Certain Cases, Fails to Adhere to Statutory Requirements and Commission Precedent.

The Joint Board's recommended cap, in addition to dismantling the competitive neutrality principle, would wreak further havoc in certain states as a result of the Joint Board's proposal that CETC support for each state should be capped at the level of CETC support actually distributed in that state in 2006.[88]

In states that currently receive little or no CETC support, the proposed cap would effectively bar competitive entry. In 2006, there were 16 states that received less than $1.5 million in CETC support, including eight states (Connecticut, Delaware, Idaho, Massachusetts, New Jersey, Ohio, Rhode Island, and South Carolina) that received no CETC support. Missouri received approximately $123,000 in CETC support in 2006, while Illinois received approximately $1,000 and Maryland received approximately $3,000.[89]

If a cap were to be imposed, CETCs would not be able to enter markets in those states with rural areas because the CETCs would be eligible to receive very little, if any, high-cost support. Without such support, it would be virtually impossible for the CETCs to deploy the infrastructure necessary to compete against ILECs in providing services to consumers in rural and high-cost areas.[90]

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[88] *Recommended Decision* at para. 13.

[89] *USAC 2006 Annual Report* at 41. The District of Columbia and the Virgin Islands also received no CETC high-cost support in 2006. *Id.*

[90] *South Dakota Preemption Order*, 15 FCC Rcd at 15173, para. 13 (footnote omitted):

> We believe that it is unreasonable to expect an unsupported carrier to enter a high-cost market and provide a service that its competitor already provides at a substantially supported price. Moreover, a new entrant cannot reasonably be expected to be able to make the substantial financial investment required to provide the supported services in high-cost areas without some assurance that it will be eligible for federal universal service support. In fact, the carrier may be unable to secure financing or finalize business plans due to uncertainty surrounding its designation as an ETC.

The cap, by imposing this effective bar to competitive entry, would violate a statutory directive. The Commission is subject to a dual legislative mandate to promote universal service and to open up local markets to competition.[91] "The FCC must see to it that *both* universal service and local competition are realized; one cannot be sacrificed in favor of the other."[92] The Commission itself acknowledged these statutory obligations more than a decade ago, noting that "[w]e are directed to remove . . . impediments to competition in all telecommunications markets, while also preserving and advancing universal service *in a manner fully consistent with competition*."[93]

Moreover, in rejecting proposals to adopt a specific national per-line support benchmark for designating ETCs, the Commission accepted arguments that a per-line benchmark that denies entry to CETCs in high-cost areas could prevent consumers in these areas from receiving the benefit of competitive service offerings. The Commission concluded that "[a]lthough giving support to ETCs in particularly high-cost areas may increase the size of the fund, we must balance that concern against other objectives, including giving consumers throughout the country access to services comparable to services in urban areas and ensuring competitive neutrality."[94] In addition, the Commission has found that any:

> mechanism that provides support to ILECs while denying funds to eligible prospective competitors . . . may give customers a strong incentive to choose service from ILECs rather than competitors. . . . [S]uch a program may well have

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[91] *See* Sections 251-253 of the Act, 47 U.S.C. §§ 251-253; *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 406 (5th Cir. 1999) ("opening local telephone markets to competition is a principal objective of the Act"); *see id.* at 412 (referencing the dual statutory goals of "provid[ing] sufficient support for universal service" and "encouraging local competition").

[92] *Alenco*, 201 F.3d at 608 (emphasis in original).

[93] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd 15499, 15505-06, para. 3 (1996) (emphasis added) (subsequent history omitted).

[94] *Federal-State Joint Board on Universal Service, Report and Order*, 20 FCC Rcd 6371, 6395-96, para. 56 (2005) (footnote omitted).

the effect of prohibiting such competitors from providing telecommunications service, in violation of section 253(a) [of the Act].[95]

The cap proposed by the Joint Board is just such a mechanism.

Some parties have argued that high-cost funds are not intended to fund competition in areas that otherwise would not support competition. Such an argument is nonsensical and must be rejected, as it presupposes a nonexistent principle favoring monopoly service. It ignores the twin goals of the Act to preserve and advance universal service while also promoting competition in local exchange markets. In short, if high-cost support is not to be used in areas that otherwise cannot support competition, then where should it be used?

The cap fails to balance concerns about increases in the size of the fund against the promotion of competitive entry, but instead (in a significant number of rural states) throws competitive entry out the window. Since the cap cannot be found to be "fully consistent with competition" it must be rejected.

VI. CONCLUSION

The Commission's rulemaking task often is to balance competing interests and claims, and thus to arrive at sound public policy. Here, the task is easy. On the one hand, the Joint Board's proposed cap violates competitive neutrality, and the Joint Board has failed to present any convincing evidence that the sustainability of the fund is in dire jeopardy, that CETCs are largely responsible for fund growth, that the fund will continue to grow at the rates projected by the Joint Board, or that consumers will be harmed if a cap is not imposed.

On the other hand, the cap would freeze the advance of competition in rural and high-cost areas, with serious consequences for consumers. Depriving CETCs of high-cost funds will

[95] *Western Wireless Corporation Petition for Preemption of Statutes and Rules Regarding the Kansas State Universal Service Fund Pursuant to Section 253 of the Communications Act of 1934*, File No. CWD 98-90, *Memorandum Opinion and Order*, 15 FCC Rcd 16227, 16231, para. 8 (2000).

deprive consumers of the benefits produced by competition. The cap would also undercut the availability of wireless services in emergency situations. High-cost fund support, by opening the door for competition, brings real and important benefits to consumers. The proposed cap would stall that engine.

Given this impact of the proposed cap on consumers, the Joint Board has a responsibility to make a convincing case that the cap is necessary and is consistent with statutory and regulatory requirements and policies. The Joint Board has not made this case. The Commission therefore should reject the Joint Board's recommendation.

Respectfully submitted,

RURAL CELLULAR ASSOCIATION AND THE ALLIANCE OF RURAL CMRS CARRIERS

/s/ David L. Nace

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June 6, 2007

EXHIBIT 1

Causes of Increase in USF Contribution Factor (First Quarter 2007 to Second Quarter 2007)

Causes of Increase in USF Contribution Factor (First Quarter 2007 to Second Quarter 2007)

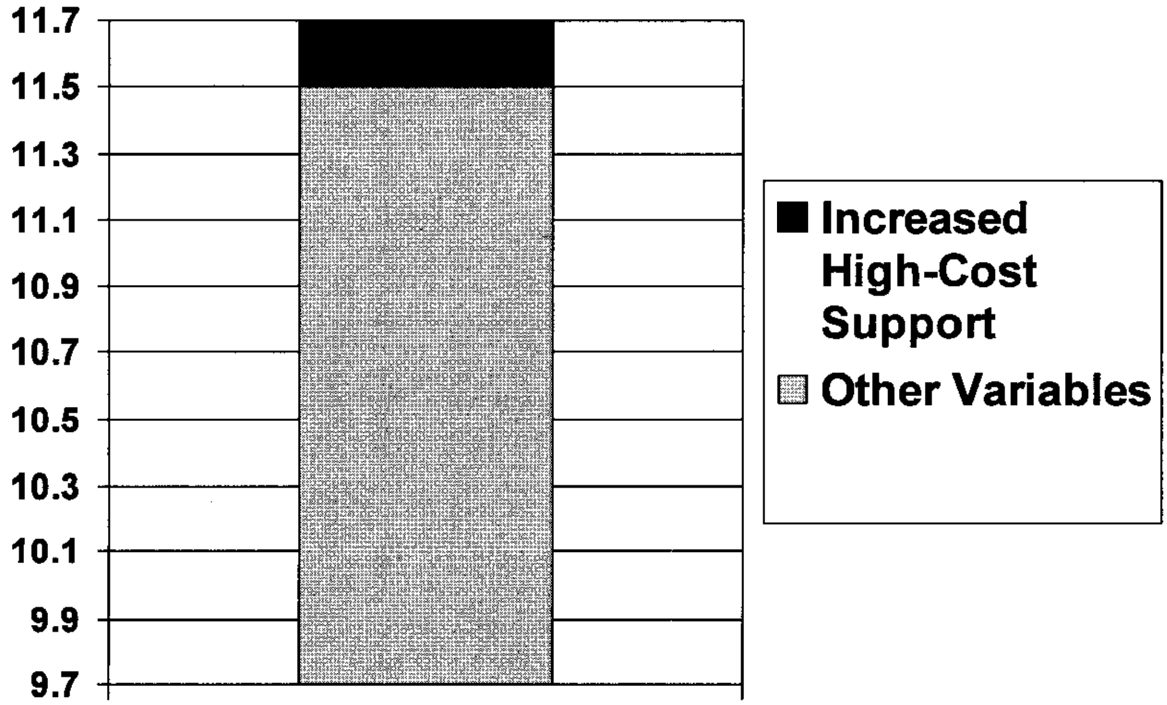

EXHIBIT 2

Average Wireline Residential Local and Long Distance Telephone Bills Plus USF Contribution Surcharge

Average Wireline Residential Local and Long Distance Telephone Bills Plus USF Contribution Surcharge

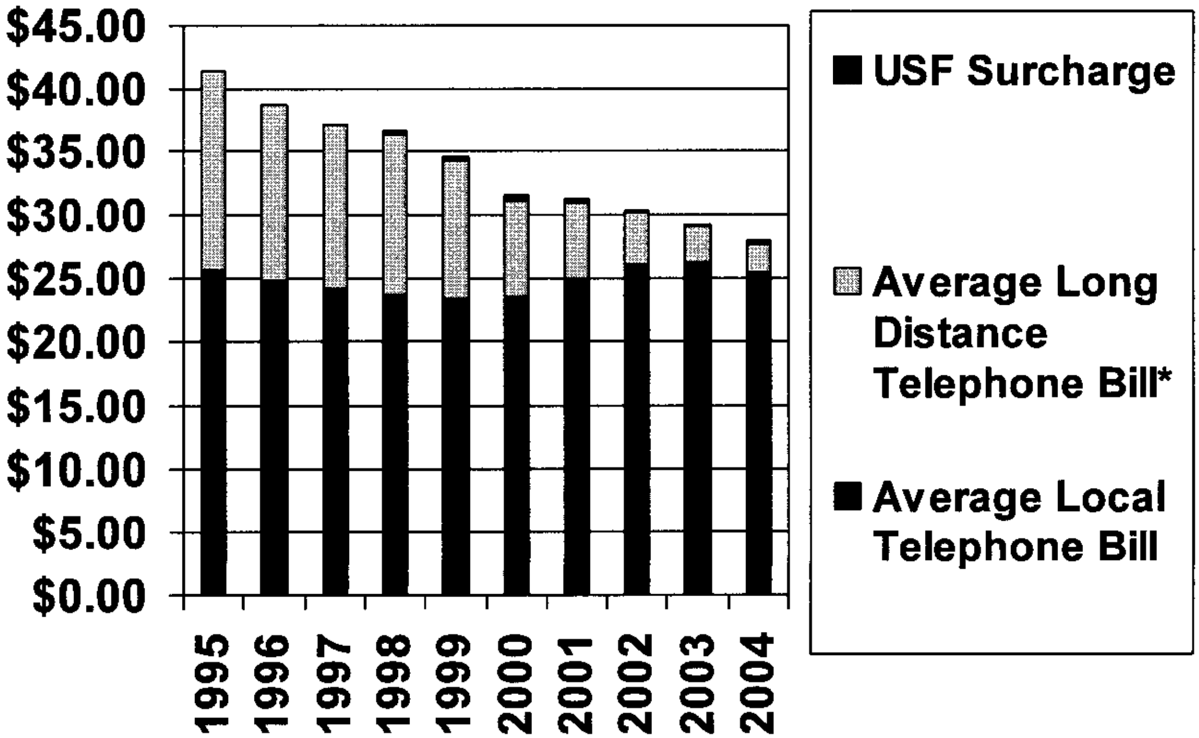

EXHIBIT 3

Per-Minute Cost of Wireless Service
(Including USF Contributions)

(1995-2006)

Per-Minute Cost of Wireless Service
(Including USF Contributions)

(1995-2006)

Sources: Source: FCC, *Trends in Telephone Service*, Table 19.17 (Feb. 2007); *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 – Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, WT Docket No. 06-17, *Eleventh Report*, 21 FCC Rcd 10947 (2006), App. A, Table 10

YEAR	(A) AVERAGE REVENUE PER MINUTE ($) 1/	(B) CONTRIBUTION FACTOR (%) 2/	(C) PER MINUTE COST OF CONTRIBUTION FACTOR ($) 3/	TOTAL COST PER MINUTE ($) (A) + (C)
1995	0.4300			
1996	0.3800			
1997	0.3700			
1998	0.2900	3.1625	0.0092	0.2992
1999	0.2200	3.0143	0.0066	0.2266
2000	0.1800	5.6980	0.0103	0.1903
2001	0.1200	6.8445	0.0082	0.1282
2002	0.1100	7.1625	0.0079	0.1179
2003	0.1000	8.7701	0.0088	0.1088
2004	0.0900	8.8000	0.0079	0.0979
2005	0.0700	10.5500	0.0074	0.0774
2006		10.1750		
2007 (1Q)		9.7000		
2007 (2Q)		11.7000		

1/ Data covers the last six months of each year.

2/ The listed number for years 1998-2006 is an average of the four quarterly contribution factors.

3/ Calculated by multiplying the average revenue per minute (A) by the contribution factor (B)